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In the Matter of)

ADJUSTMENT OF THE RATES)

FOR NONCOMMERCIAL)

EDUCATIONAL BROADCASTING)

COMPULSORY LICENSE)

Docket No. 96-6 CARP NCBRA

PETITION TO MODIFY DETERMINATION OF THE PANEL

Preliminary Statement

SESAC, Inc. ("SESAC"), pursuant to §251.55(a) of the rules, 37 CFR, hereby petitions the Librarian of Congress to modify the determination of the Copyright Arbitration Royalty Panel in this proceeding, filed with the Copyright Office on July 22, 1998. SESAC's petition seeks modification of a single statement in footnote 10 on page 6 of the Panel's Report in which the Panel, improperly in SESAC's view, purported to make a finding with respect to the percentage of PBS's music use from the SESAC repertory.¹

¹ Footnote 10 provides in its entirety: "Collectively, ASCAP and BMI represent the vast majority of songwriters, composers, and publishers whose copyrighted musical works are performed by Public Broadcasters. *The repertory of the third performing rights organization, SESAC, not a party to this proceeding, comprises only about one-half of one percent of PBS's music use.* W.D. of JAFFE 3, n.2. Indeed, the impressive market share enjoyed by ASCAP and BMI have subjected each to antitrust scrutiny resulting in federal consent decrees governing certain aspects of their operations and the creation of a "rate court". See e.g., *U.S. v. ASCAP*, 1959 [sic]-51 Trade Cas. (CCH) ¶62,595 (S.D.N.Y. 1950); *U.S. v. BMI*, 1966 Trade Cas. (CCH) ¶71,378 (Dec. 29, 1996) (emphasis supplied)." SESAC petitions herein for modification of only a portion of the highlighted statement — see Conclusion, *infra*.

Reason's For Granting SESAC's Petition

SESAC respectfully submits that the statement by the Panel in footnote 10 regarding SESAC's music share on Public Broadcasting should be stricken from any Report finally adopted by the Librarian for the following important reasons:

(i) Approving such a purported finding would represent a fundamental deprivation of the due process rights of SESAC as a settling party in this proceeding. The statement in footnote 10 leaves the unwarranted impression that the Panel determined *what would have been the central contested fact at issue in any proceeding between SESAC and PBS*, had SESAC's claim not been settled. Yet the issues between SESAC and PBS *were* settled and, having settled its claim, SESAC was not present before the CARP and was therefore unable to submit evidence pertinent to, or to cross-examine the basis for, such a purported finding. (Point I, *infra*)

(ii) The Panel's purported finding was insufficiently supported in the record, *inter alia*, because SESAC's absence from the proceeding in the context of its confidential settlement rendered the record materially incomplete. SESAC was not present to submit evidence to the CARP with respect to the issues that had been settled as between SESAC and PBS. Nor, unlike the non-settling parties who were present before the CARP, did SESAC have access to, or occasion to review, to cross-examine, to challenge or to undertake to rebut those submissions that the Panel deemed central to its music share findings with respect to the non-settling parties.²

² Not only does SESAC believe that the Panel's statement regarding SESAC was insufficiently supported in the record, but SESAC firmly believes that the Panel's finding was incorrect in understating SESAC's music use by Public Broadcasting. Accordingly, if SESAC had chosen to litigate with PBS rather than to settle its claims, SESAC would most certainly have contested the testimony of PBS's expert with respect to SESAC's music use based on various indicia not present or cross-examined in the record due to the SESAC's absence from the proceeding before

(Point II, *infra*)

(iii) In any event, in the circumstances, the Panel's reference to SESAC's alleged music share was irrelevant and unnecessary to its determination of the disputed claims of the non-settling parties — *as the Panel itself ultimately and expressly concluded.* (Point III, *infra*)

(iv) Finally, approving such a purported finding in the Panel's Report would severely prejudice SESAC, and would deter other parties in future CARP proceedings from entering into partial settlements wherever there was any possibility that the settling party might be prejudiced by its absence from the unsettled aspects of the proceeding. (Point IV, *infra*)

SESAC's Participation as a Party in this and Prior Copyright Office Proceedings and Its Standing as a Party to Be Heard With Respect to this Petition to Modify the Panel's Order

As one of the three U.S. performing rights organizations, SESAC has historically participated in all compulsory license proceedings with respect to music performing rights in the Copyright Office, before the Copyright Royalty Tribunal and most recently before the CARPs. Specifically, beginning January 1, 1978, pursuant to Section 118 of the 1976 Copyright Act, SESAC has participated in every previous compulsory license proceeding involving non-commercial educational broadcasting. See 1992 Adjustment of the Public Broadcasting Royalty Rates and Terms, Docket No. CRT 92-2 PBRA (57 FR 60954, December 22, 1992); 1987

the CARP. Of course, in this petition SESAC does not and cannot challenge the correctness of the Panel's finding on the merits for the very reason that it would be inappropriate and indeed impossible for SESAC to attempt at this juncture in the proceeding to reopen the record in order to test the correctness of any finding by the Panel. For the same reason, we respectfully submit that it was inappropriate for the Panel to purport to make and, as we demonstrate herein, it would be inappropriate for the Librarian to affirm, an unnecessary and unsupported determination regarding SESAC's music use by Public Broadcasting under these circumstances.

Adjustment of the Public Broadcasting Royalty Rates and Terms, Docket No. CRT 87-4 PBRA (52 FR 49010, December 29, 1987); 1982 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Non-commercial Broadcasting Terms & Rates of Royalty Payments, Docket No. CRT 82-2 (47 FR 57923, December 29, 1982); 1978 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Non-commercial Broadcasting Terms & Rates of Royalty Payments (43 FR 25068, June 8, 1978).

SESAC became a party in this proceeding, having duly and timely filed its Notice of Intent to Participate, pursuant to 37 CFR 251.45(a), on December 12, 1996. Thereafter, SESAC, NPR and PBS were able to reach a privately-negotiated, confidential settlement and the Copyright Office was so advised by Notice of Settlement filed on October 1, 1997, see 62 FR 63502 (December 1, 1997). As a consequence, because its claims had been settled and entirely resolved, SESAC did not participate in the just-concluded CARP, although NPR and PBS did participate due to their failure to reach voluntary settlements with ASCAP and BMI.

In similar circumstances, in the 1990 - 1992 Cable Distribution proceeding, the Librarian not only considered but granted an application to modify the determination of the CARP, submitted by parties to the proceeding that had settled and therefore did not participate in the CARP. In that proceeding, the settling parties who sought to modify the Panel's determination argued that they had "a significant interest in the accuracy of the Librarian's final determination" due to "certain factual errors and omissions" in the Panel's ruling. The Librarian accepted two of the settling parties' requested modifications, while considering the third in making its final determination. See Distribution of 1990, 1991 and 1992 Cable Royalty Funds, Docket No. 94-3 CARP-CD-90-92 (61 FR 55653, October 28, 1996)(acting upon letter petition of August 2, 1996

submitted by National Public Radio, SESAC, ASCAP and BMI).³

Similarly here, as a settling party to the proceeding SESAC has a significant interest in assuring that the Librarian's final determination not include an unnecessary and prejudicial finding regarding SESAC, unsupported by any record in which SESAC had an opportunity to participate.

SESAC's Confidential Settlement with PBS And Its Inconsistency with the Panel's Purported Finding Regarding SESAC's Music Share on Public Broadcasting

In this proceeding, consistent with each of their previous license renewals, SESAC, NPR and PBS agreed that their voluntary settlement with respect to fees for the 1998 - 2002 period would be deemed confidential. Pursuant to this longstanding past practice, which was in accord with the consistent practice of BMI as well, the license fees paid by PBS and NPR to SESAC had never been publicly revealed and this confidential treatment was again agreed upon with respect to the new license period.

However, the settlement agreed to between SESAC and PBS for the most current period was unlike their settlements for the prior periods in one significant respect, because at the time SESAC and PBS reached agreement on their settlement for 1998 - 2002, it was understood that PBS had been unable, for the first time in twenty years, to reach a settlement with ASCAP and

³ The Librarian's rejection of the petition to modify of EchoStar in the 1996 Satellite Rate Adjustment Proceeding is not inconsistent. In that proceeding the Librarian reasoned that so long as it has filed a Notice of Intent to Participate a party to the proceeding has standing to file a petition to modify a Panel's report. As the Register there noted in her recommendations to the Librarian, see Final Rule and Order in the Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP SRA, Federal Register, Vol. 62, No. 208, 55753, n.14, "EchoStar lacks standing to file a petition to modify the Panel's determination Section 251.55(a) of the rules, 37 CFR provides that only *parties* to the proceeding may file petitions to modify, and makes no provision for nonparties. EchoStar, though a member of, and represented by SECA, was not a party to this proceeding *because it did not file a Notice of Intent to Participate* as required by the rules. See 37 CFR 251.45(a)." (emphasis supplied)

BMI. Accordingly, the settling parties contemplated that PBS would be required to litigate the claims and music shares of ASCAP and BMI before the CARP. SESAC was thus appropriately concerned that its interests should not be prejudiced in any proceedings in which it would not be present.

For this reason, in addition to the standard non-disclosure agreement, SESAC and PBS further agreed that PBS should take all reasonable steps to protect SESAC from involvement in the CARP, including that PBS would not affirmatively disclose information regarding the SESAC settlement except if required in rebuttal to the direct testimony of ASCAP or BMI. As discussed below, PBS subsequently honored its obligation to give SESAC notice of any effort to introduce the confidential settlement agreement in the CARP. However, PBS did affirmatively put into the record, through the testimony of an expert witness, an allegation regarding SESAC's purported music share on Public Broadcasting. *It was this testimony by PBS upon which the Panel expressly relied in the challenged footnote.*⁴

SESAC believes that in affirmatively introducing this testimony PBS acted inconsistently with its agreement to use reasonable efforts to shield SESAC from involvement in the proceeding, except to the extent unavoidable in order to protect its own interests *vis-a-vis ASCAP and BMI* — in the rebuttal phase of the proceeding.⁵ We understand that PBS disagrees with this

⁴ It is understood that BMI also introduced certain evidence in its rebuttal case, not adverted to by the Panel in footnote 10, that also addressed the music share issue. As discussed below, the BMI rebuttal testimony was also drawn from the same PBS database as was said to support the direct testimony of PBS's expert witness. And because its claim had been settled, SESAC likewise had no opportunity to be heard on the validity of BMI's conclusions based on PBS's data, which conclusions were themselves hardly self-evident (see Point II, *infra*).

⁵ As the proceeding unfolded it is evident that PBS concluded it had no need to introduce the SESAC settlement in rebutting any submission by ASCAP or BMI. This conclusion is seemingly confirmed by PBS's successful undertaking to oppose the CARP's April 8 Order for production of the SESAC settlement (see below).

interpretation of the settlement agreement. It is not necessary to challenge PBS's good faith in this regard, nor otherwise to resolve this dispute, however, in order to reach the conclusion that under all of the circumstances the Panel's reliance on this affirmative testimony by PBS was prejudicial to SESAC. For whatever reason that the challenged statement found its way into footnote 10, its inclusion will effect a substantial injustice unless the Librarian excises the inappropriate and unwarranted statement from the Panel's Report.

I. Due to SESAC's Absence from the CARP, The Panel's Purported Finding in Footnote 10 Represents a Clear Violation of SESAC's Due Process Rights

It is black letter law that a party's interests should not be determined in the absence of notice and an opportunity to participate and to be heard on a finding potentially adverse to the party's interests in an action. It is beyond disputing that the result of this CARP — if the Panel's Report were left uncorrected by the Librarian — was *precisely* what the most fundamental requirements of due process are designed to avoid. That is, in SESAC's absence the record of the CARP was self-evidently left incomplete and SESAC was given no notice or opportunity to correct, complete or challenge that record. Yet, SESAC will have been prejudiced by the adverse, *ex parte* finding of a Panel before which it had no opportunity to appear or to be heard subsequent to the settlement of SESAC's claim.

II. Because of SESAC's Absence from the CARP, The Resulting Record was Clearly Insufficient to Support any Finding Regarding SESAC's Music Use on Public Broadcasting

It is literally impossible for SESAC to undertake a meaningful examination of the adequacy

or inadequacy of the record upon which the Panel purported to base its statement in footnote 10 regarding SESAC's share of music use on Public Broadcasting. This is because the most pertinent of the record exhibits are subject, in whole or in part, to protective orders and have therefore been, and continue to be, unavailable to SESAC which had no occasion to participate in confidentiality agreements permitting access to the protected documents or data exchanged among the non-settling parties and subsequently introduced into the record before the CARP.⁶

Nonetheless, SESAC has good reason to believe that the PBS database is inaccurate in various regards with respect to the misidentification of, or failure to identify, works in the SESAC repertory. In fact, during settlement negotiations SESAC brought to PBS's attention what SESAC viewed as significant errors and omissions regarding the SESAC repertory in PBS cue sheets. However, without access to the PBS database that was utilized in the CARP it is impossible to know whether such errors had or had not been corrected. In any event, once again, we would have assumed such contested issues were rendered moot upon settlement with PBS and they cannot, of course, be fully explored or litigated at this juncture.

The Librarian need not determine, however, nor even undertake to examine, whether the Panel's purported finding regarding SESAC's music use on Public Broadcasting was correct or incorrect on the merits, in order to conclude that the Panel's statement in footnote 10 was insufficiently supported in the record of this proceeding. For even a cursory review of the proceedings before the Panel demonstrates that in SESAC's absence the record upon which to base

⁶ As one notable example, in preparing this petition SESAC was not even able to secure access to the totality of the Direct Testimony of Dr. Adam Jaffe, the PBS expert witness whose testimony was expressly relied on by the Panel in its footnote 10 statement regarding SESAC. Moreover, SESAC has had no access to the underlying PBS music use database upon which the Jaffe testimony and the BMI rebuttal testimony were both based — see below.

any finding as to SESAC's share of music on Public Broadcasting was clearly incomplete and grossly inadequate.

The Panel began its analysis of the relative ASCAP and BMI music shares with the following most significant observation:

"The parties [i.e., ASCAP, BMI and PBS] devoted considerable hearing time and effort attacking other parties' music use analyses. Indeed, each analysis is vulnerable to legitimate criticism with respect to both the methodology employed and the data used. *See generally PB PFFCL 57-66; ASCAP PFFCL 92; BMI PFFCL 47-52. See also W.R. of Jaffe* (no commonly accepted indicator exists to quantify use of music or relative shares of music)." (Panel Report at 31)

If the positions of each of the participating, non-settling parties — who as the Panel noted had "devoted considerable hearing time and effort attacking the other parties' music use analyses" — were recognized by the Panel as being "vulnerable to legitimate criticism with respect to both methodology employed and data used," then the most serious question must surely be raised as to the adequacy of the record before the CARP with respect to SESAC's relative music share. It is self evident, we respectfully submit, that there cannot possibly be a sound basis which the Librarian could properly affirm for the Panel to have purported to make a definitive finding regarding the issue of SESAC's music share on Public Broadcasting — an issue that would likewise have been vigorously contested by SESAC but for the settlement that had rendered the issue moot and therefore (at the very most) incompletely developed in the record.

There are numerous key aspects of the record that were clearly undeveloped or inadequately developed because of SESAC's absence from the proceedings before the CARP.

For example, the Panel relied centrally upon the PBS music data analysis, which the Panel

in the end found to be "the most credible and reliable." Although we cannot know for certain, because the data has never been made available to SESAC for any purpose, we take it that this was the same database that PBS had expressly refused to provide to SESAC in connection with its voluntary negotiations prior to the CARP proceeding. During those negotiations SESAC sought to challenge specific inaccuracies in PBS cue sheets and other music use data but was advised in no uncertain terms that access to the PBS database would be at the price of litigation if a settlement could not be achieved. Certainly it is clear that SESAC never had an opportunity even to review — much less to devote "considerable ... time and effort" to attacking or criticizing — this PBS data, the cost of which we are advised would have been in the tens if not the hundreds of thousands of dollars for computer time and expert economic analysis.⁷ And so the state of the record with respect to this pivotal database on which the Panel ultimately relied was clearly suspect, at least with respect to its application to SESAC as a settling party that never had an opportunity to examine or undertake to rebut the database.

Relatedly, the Panel may also have considered certain rebuttal testimony submitted by BMI that was also developed directly from the PBS database. However, it is evident that any reliance on BMI's conclusions, in the absence of SESAC's presence to review and to challenge either the PBS database or the BMI analysis derived therefrom would — *at least vis-a-vis SESAC* — also be

⁷ Such prohibitive costs, in relation to SESAC's relatively small music share on Public Broadcasting, were another factor in SESAC's decision to settle with NPR-PBS rather than to spend more in litigating the contested issues than the NPR-PBS license was projected to be worth to SESAC — even if based on a fair and supportable SESAC music share. SESAC's concerns regarding the prohibitive costs of participating in the CARP would have been further validated under the Panel's ruling ordering the equal division of costs among the three remaining parties. Were a relatively small participant like SESAC required to pay an equal share of the costs of the entire proceeding (e.g., one quarter of the costs had SESAC litigated its claim rather than settled here), such a rule would surely deter parties like SESAC from participation in future CARPs.

fundamentally suspect. This is especially so in light of BMI's acknowledged multiple manipulations of the PBS data (to which data SESAC has of course never had access) that are, to say the least, far from self-evident or self-effectuating.

Thus, according to BMI's expert, at least the following operations were performed on the PBS database in order for BMI to massage the data and arrive at its uncross-examined assertions regarding the SESAC music share on Public Broadcasting:

- BMI apparently used PBS data previously provided to ASCAP's economist, Dr. Jaffe, who BMI's expert Dr. Bruce Owen claims "did not present any testimony on the respective share music shares of BMI, ASCAP and SESAC ... though his underlying data included information from which it is possible to make this calculation." Again, having not participated in the CARP, SESAC is unable to speculate as to how Dr. Jaffe was able to support his suggestion regarding SESAC's music share upon which the Panel ultimately based its purported finding in footnote 10 if, as Dr. Owen asserts, Dr. Jaffe had not presented any testimony on respective music shares;
- The PBS database was apparently limited to "PBS National Feed." Having not participated in the CARP, it is not known to SESAC what programming the "PBS National Feed" includes or excludes from the analysis, and the extent to which excluded programming contains performances of music in the SESAC repertory;
- The PBS data apparently included program information and cue sheets, which the BMI expert had an opportunity to comprehensively review, which was then apparently supplemented by 1992 cue sheet information added from ASCAP's own sample of cue sheets, to none of which did SESAC have any access;
- The BMI expert, as well as the ASCAP expert, apparently had an opportunity to fill in music use information where it was missing in this data, a process into which, obviously, SESAC had no input despite its knowledge of errors in the PBS cue sheets regarding SESAC's repertory, and despite SESAC's longstanding problems with other performing rights organizations in terms of misidentification of SESAC repertory in their databases. There is

no reason to expect that ASCAP or BMI would have had any occasion or ability to fill in missing music use information related to the SESAC repertory;

- The BMI expert then apparently utilized used a further series of arbitrary manipulations in order to complete his analysis of music shares. Thus, where cue sheets were missing for some but not all episodes he apparently assumed equal music usage in missing cues — an assumption potentially disadvantageous to a small performing rights organization such as SESAC with potentially relatively sporadic music use from program to program; where cue sheets were missing for all episodes in an entire series he apparently assumed averages from similar type of programming — again, an assumption potentially disadvantageous to SESAC whose significant music might by this means have been entirely excluded from a missing series, which we believe may in fact have occurred; and similar assumptions were made for missing program types — again potentially to SESAC's disadvantage;

- Finally, BMI's expert then apparently performed yet another operation on the database of ASCAP's expert who had supposedly excluded all cues that were purely SESAC; so that the BMI expert allegedly had to add back into the data SESAC cues, along with public domain and music with "unknown" affiliations — surely an operation in which SESAC would have an interest, but for its absence from the proceeding.

All such elaborate operations and manipulations of the data, as the Panel itself noted, were either vigorously contested — or at least were available to be contested — as among the non-settling parties who were present before the CARP. And as the Panel concluded, even as to those active parties, the record was left far from clear regarding the validity and conclusions to be reached from the data as so manipulated and presented. In SESAC's absence from all of this record-making and record-analyzing activity it borders on the absurd to suggest that this contested record could fairly be held to support any definitive statement by the Panel regarding SESAC's music share on Public Broadcasting.

In the end, the Panel also accorded pivotal significance to the pattern of prior settlements between ASCAP, BMI and PBS. Thus, the Panel reviewed at length (Report at Pages 32-34) the history of fees negotiated by ASCAP and BMI with PBS from which the Panel considered itself able to find a "consistent division of fees" that the Panel concluded "reflect[ed] the parties [sic] perception of respective music use shares." Once again — and in stark contrast — the state of the Record before the Panel on this issue, as the Panel itself noted in its April 8 Order (see Point III, *infra*), was devoid of *any* information regarding SESAC's prior confidential settlements with PBS. After BMI changed its methodology and the Panel determined that it no longer had a need for evidence as to the "SESAC rate," the record in the CARP remained devoid of this crucial piece of evidence that the Panel considered vital to its determinations as to ASCAP and BMI.

III. The Panel's Purported Finding Regarding SESAC Music Use on Public Broadcasting Was Extraneous and Unnecessary to Its Determination. As the Panel Itself Ultimately Recognized

The purported finding regarding SESAC's share was not only violative of SESAC's rights to due process and unsupported in the record, but it was also unnecessary to the Panel's ultimate determination. The contested issues before the CARP concerned the setting of license fees *for ASCAP and BMI — not for SESAC —* because SESAC had settled its claims with PBS. Indeed, the Panel's ultimate determination, and its chosen methodology, confirm that there was no need whatever to comment upon, or to suggest any finding by the Panel regarding, SESAC's share of music use on Public Broadcasting.

Thus, as SESAC understands its ultimate decision, the Panel's methodology was rather

simple. The Panel chose to adopt the Copyright Royalty Tribunal's 1978 determination of the ASCAP/PBS license fee as the baseline for the "fair market value" of PBS music license fees. It then adjusted the 1978 fair market value based on the growth in PBS "revenues" (as the Panel defined them) between 1978 and 1996. To determine ASCAP's license fee the Panel then adjusted for what it found to be the "decline in ASCAP's share of total ASCAP/BMI music usage" by PBS. (Panel Report at 26). Using the ASCAP 1978 fair market value also as the benchmark for BMI, and awarding to BMI a fee representing "current 39% BMI share of total ASCAP/BMI usage," the Panel derived BMI's awarded fee.

In sum, for purposes of its ultimate calculation of fees awarded to ASCAP and BMI, the Panel neither relied upon — nor was it in any fashion required to determine — SESAC's share of music on Public Broadcasting.

Significantly, prior to the issuance of its ruling, the Panel had occasion to focus on the question of SESAC's absence from the proceeding, the unavailability of evidence regarding SESAC's music share on Public Broadcasting, and the question of the confidentiality of the SESAC/NPR/PBS settlement. The subsequent resolution of the Panel's April 8 Order gives further support to a conclusion that no determination of SESAC's music share on Public Broadcasting was required by the Panel in order to resolve the ASCAP and BMI license fee issues. (A copy of the April 8 Order is annexed to this Petition as Exhibit A.)

The Panel's April 8 Order reveals that there came a time toward the end of the CARP proceeding when the Panel expressed its concern with the state of the record regarding support for certain of the methodologies proposed for the determination of ASCAP and BMI license fees. The Panel recognized that SESAC was not participating in the proceeding due to its settlement and that

there was no evidence before it of the SESAC/PBS settlement or of "[t]he SESAC rate" in relation to the "BMI/ASCAP relative share of music used by Public Broadcasters." (April 8 Order at 2) The Panel's concern arose because BMI was at that point in the proceeding proposing as one alternative methodology that its license fee be set at "not less than 38.6% of all the total fees set for (or voluntarily agreed to be paid to) ASCAP, BMI and SESAC by the PBS stations (emphasis supplied)." For this reason, the Panel expressed its desire for information regarding the SESAC settlement and ordered its production.

In response to the Panel's Order, and in compliance with its agreement to assure that SESAC have an opportunity to be heard in the event of any effort to compromise the confidentiality the SESAC/NPR/PBS settlement agreement, PBS notified SESAC of the Panel's Order. On April 27 SESAC's General Counsel wrote to PBS's trial counsel stating SESAC's position regarding the need to preserve the confidentiality of the agreement and emphasizing the harm to SESAC were the settlement agreement to be revealed or were any other prejudicial finding or ruling made with respect to SESAC in the proceeding:

"For SESAC's part, another significant factor in settling with NPR-PBS was to avoid costly participation in the CARP. At the same time SESAC wished to avoid being prejudiced by its absence from the proceedings to the extent that revelation of the settlement might lead to any prejudicial finding or ruling with respect to SESAC without an opportunity for SESAC to participate in or contest such a finding or ruling (emphasis supplied)." (A copy of SESAC's April 27 letter is Annexed as Exhibit B)

Although SESAC did not participate further in the proceeding, we are aware that, upon its further review of these issues, the Panel withdrew its Order for production of the

SESAC/NPR/PBS settlement agreement. SESAC was advised at the time that a pivotal factor in the Panel's change of view was BMI's decision to modify its alternative fee methodology *by entirely eliminating SESAC from the equation*. This decisive change of circumstances, eliminating the need for the Panel to consider or make a determination regarding SESAC's fees or music share, is confirmed in the Panel's Report (at 12):

"BMI initially urged the Panel to set a license fee for BMI which is not less than 38.6% of the combined fees payable to BMI, ASCAP and SESAC *but subsequently modified its methodology to reflect a minimum request of 42.5% of all fees payable to BMI and ASCAP.*" (emphasis supplied)

In sum, whether or not the Panel had at one point in time expected that evidence regarding "the SESAC rate" would be critical to its determination, the Panel clearly changed its mind. In the end, the Panel never obtained nor had before it evidence of the SESAC/NPR/PBS settlement, nor did it further seek to explore the relationship between the SESAC rate and the BMI/ASCAP relative share of music used by Public Broadcasters. Accordingly, when the Panel purported to make a statement in footnote 10 regarding SESAC's "music share on PBS," its observation in that regard was both unsupported in the record — by the Panel's own prior acknowledgment in the April 8 Order regarding the complete absence of SESAC evidence — as well as being irrelevant, unnecessary and gratuitous to any purpose of the Panel with respect to a determination of the unsettled disputes between PBS and ASCAP-BMI as ultimately defined by the non-settling claimants as well as by the Panel itself.

IV. Retention of the Panel's Purported Finding Would Be Prejudicial to SESAC and Would Deter Partial Settlements in Future CARP Proceedings

Not only was the Panel's statement in footnote 10 regarding SESAC's purported share of music use on Public Broadcasting a violation of SESAC rights to due process, not only was the purported finding unsupported in the record, not only was the finding unnecessary, but retention of the Panel's finding would be prejudicial to the substantial interests of SESAC and to settling parties in future CARP proceedings.

The purported finding would deprive SESAC, or any settling party, of the full value of its settlement. In this proceeding the benefit of SESAC's bargain for NPR-PBS was that SESAC would waive its right to join with ASCAP and BMI in attempting to increase their license fees from Public Broadcasting. In return, however, SESAC would be spared the costs and risks of litigating its share of license fees — including, of course, the risk and potential harms that could be caused by any adverse determination on the public record of SESAC's music share on Public Broadcasting.

It is notable and ironic that in its Report the Panel itself specifically addressed and recognized the significance and gravity of such potential harms. Thus, in reaching the conclusion that both ASCAP and BMI had voluntarily subsidized the Public Broadcaster's rates in prior settlements to the tune of millions of dollars, the Panel specifically found (Report at page 21) that BMI had subsidized Public Broadcasters, particularly with respect to its 1992 - 1997 settlement, because "BMI feared unfavorable music share data would be made public to other licensees" in the course of any litigated proceeding. The same observation holds true with respect to the SESAC settlement for the 1998 - 2002 period, notwithstanding the presumably unintended assault

by the Panel's statement in footnote 10 upon the very same interests of SESAC.

Moreover the prejudice to SESAC, a far smaller entity than BMI or ASCAP, could be magnified by any error in the Panel's purported but unnecessary finding. Thus, in the context of the Panel's statement purporting to find "only about one-half of one percent" SESAC music share on Public Broadcasting, an error to SESAC's disadvantage of even one-tenth of one percent would have as much of an impact, as a percentage of potential license fees, as an error of approximately eight to twelve percent, respectively, with respect to the BMI or ASCAP music share findings. An error of one percent in the SESAC share would be the equivalent of a 200% understatement of SESAC's fee entitlement. Similarly, as addressed in Point III, *supra*, in light of SESAC's relatively small share of music on Public Broadcasting, the omission or misidentification of any significant SESAC repertory in the PBS database could have a disproportionately significant impact on the proper calculation of SESAC's music use share.

Accordingly, by including in its final Report an unsupported and unexamined finding regarding SESAC's purported music share on Public Broadcasting, the Panel unnecessarily imposed the worst of all possible results. It made a specific finding adverse to SESAC, while at the same time both negating the value to SESAC of its settlement with NPR-PBS and also denying to SESAC the ability to participate in the proceeding for the purpose of contesting the adverse finding. Such a "lose-lose" scenario would surely deter other parties from partially settling future cases for fear of similar prejudice to their interests in connection with any ongoing CARP proceeding.

Conclusion

For all of the foregoing reasons, SESAC respectfully requests that the Librarian modify the Panel's Report by deleting the purported finding regarding SESAC's music use share on Public Broadcasting in footnote 10 on page 6, so that the pertinent portion of the footnote would read, in sum or substance:

"Collectively, ASCAP and BMI represent the vast majority of songwriters, composers and publishers whose copyrighted musical works are performed by Public Broadcasters. The repertory of the third performing rights organization, SESAC, which has entered into a confidential settlement of its claims with PBS and is therefore no longer a participant in this proceeding, represents only a small percentage of PBS's music use, the precise extent of which the Panel is not here called upon to determine. Indeed, the impressive market share"

Respectfully submitted,

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Docket No. 96-6 CARP-NCBRA

ORDER

BACKGROUND

In our Order of April 6, 1998, the Panel stated that Rule 251.46(d) reflects the established principal of administrative adjudication that finders-of-fact are affirmatively charged with a duty to adequately develop the administrative record in order to render a decision supported by substantial evidence. The Rule provides that the Panel "may ... call upon any party for the production of additional evidence at any time."

The parties to this proceeding have proposed three separate flat rates pursuant to three distinct methodologies. Two of the three methodologies require the Panel to render a determination of the ratio of current ASCAP versus BMI music use by Public Broadcasters (*i.e.*, the percentage of music currently used by Public Broadcasters which is contained in the ASCAP repertory versus that percentage which is contained in the BMI repertory). Public Broadcasters propose to use rates voluntarily negotiated in the past with ASCAP and BMI as a benchmark for setting current rates, but, Public Broadcasters have adduced no evidence from which the Panel can apportion rates under this methodology, between ASCAP and BMI. BMI has proposed to

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use recent commercial license rates as a benchmark for setting current rates for Public Broadcasters. However, BMI has also urged the Panel to set a minimum rate for use of BMI music by PBS television stations, which is not less than 38.6% of all the total fees set for (or voluntarily agreed to be paid to) ASCAP, BMI, and SESAC¹ by the PBS stations. This minimum rate request is based upon evidence adduced by BMI reflecting that 38.6% of *all* music used by PBS stations is contained in the BMI repertory. But, BMI has not adduced any evidence of the actual rate negotiated between Public Broadcasters and SESAC. Consequently, the Panel can not use the evidence adduced by BMI with respect to its 38.6% minimum rate proposal.

Beyond that evidence already adduced by BMI, neither BMI nor ASCAP intend to stipulate to, or adduce any additional evidence, reflecting their relative share of Public Broadcasters music use². The SESAC rate, in conjunction with the evidence already adduced by BMI, constitutes the only evidence available to the Panel which reflects upon the BMI/ASCAP relative share of music used by Public Broadcasters. Accordingly, the SESAC rate is potentially critical to the Panel's ultimate determination of rates.

ORDER

Pursuant to Rule 251.46(d), the Panel hereby ORDERS Public Broadcasters, by close of business on April 29, 1998, to submit to the Panel a copy of the voluntary license agreement

¹ SESAC, a third performing rights society, entered into a voluntary license agreement with Public Broadcasters for the period at issue here, January 1, 1998 through December 31, 2002. Accordingly, they are not a party to this proceeding. See Notice of Settlement filed on October 1, 1997, and 62 FR 63502 (Dec. 1, 1997).

² Tr. 3005-06.

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negotiated between Public Broadcasters and SESAC, including the applicable rate terms, for the 1998 through 2002 period, *or to show cause why it can not comply with said Order or why it should not be required to comply.* Replies from the performing rights societies, if any, shall also be submitted by close of business on April 29, 1998.

SO ORDERED, April 8, 1998

Lewis Hall Griffith / JGS
Lewis Hall Griffith,
Chairperson

Jeffrey S. Gulin
Jeffrey S. Gulin,
Panelist

Edward Dreyfus / JGS
Edward Dreyfus,
Panelist



HENRY R. KAUFMAN
SENIOR VICE PRESIDENT
GENERAL COUNSEL

April 27, 1998

Via Fax: 212 310 8007
Bruce Rich, Esq.
Weil, Gotshall & Manges, LLP
767 5th Avenue
New York, New York 10153-0119

Re: 96 NCBRA

Dear Bruce:

I am writing to you in connection with the pending CARP proceeding in the above matter among NPR-PBS, ASCAP and BMI. Specifically, you have advised that the CARP has on its own motion requested disclosure of the agreement that was arrived at prior to the commencement of the pending proceeding, settling the matter of license fees between SESAC and NPR-PBS for the five-year period now under consideration by the CARP.

As you know, the SESAC/NPR-PBS agreement was specifically denominated as confidential. For its part, SESAC sought such confidentiality because it did not consider the agreement, entered into for settlement purposes only, to be determinative of the actual value of the SESAC license or of SESAC's share of musical performances in the non-commercial educational broadcasting market. Accordingly, the agreement between SESAC and NPR-PBS provided, to the extent possible, that the settlement should not be affirmatively introduced in the CARP or otherwise become a part of the proceeding.

For SESAC's part, another significant factor in settling with NPR-PBS was to avoid costly participation in the CARP. At the same time SESAC wished to avoid being prejudiced by its absence from the proceedings to the extent that revelation of the settlement might lead to any prejudicial finding or ruling with respect to SESAC without an opportunity for SESAC to participate in or contest such a finding or ruling.

We appreciate your undertaking to notify us of these developments as well as your undertaking to effectuate our prior agreement regarding the confidentiality of the SESAC/NPR-PBS settlement. If, following further consideration by the CARP and the parties, the matter of the production of the SESAC/NPR-PBS agreement remains at issue, then I would appreciate your advising the CARP that SESAC wishes to be heard on this matter, either orally or in writing, prior to any such disclosure.

Best regards.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Henry".
Henry R. Kaufman

HRK/mwh


CERTIFICATE OF SERVICE

I, Henry R. Kaufman, an attorney, hereby certify that I caused a copy of the foregoing Petition to Modify Determination of the Panel dated August 5, 1998, Docket No. 96-6 CARP NCBRA, before the Copyright Arbitration Royalty Panel, United States Copyright Office, Library of Congress, to be delivered by overnight United Parcel Service (UPS) on this 5th day of August, 1998, to each of the parties listed on the attached service list.

Deponent is over the age of 18 years and not a party to this action.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on August 5, 1998


Henry R. Kaufman

SERVICE LIST
Docket No. 96-6 CARP NCBRA

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